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No. 96-1570

In the

Supreme Court of the United States

October Term, 1997

NYNEX CORPORATION,
NYNEX MATERIEL ENTERPRISES COMPANY,
and NEW YORK TELEPHONE COMPANY,

Petitioners,

v.

DISCON, INCORPORATED,

Respondent.

On Writ of Certiorari to the United States
Court of Appeals for the Second Circuit

BRIEF OF *AMICI CURIAE* LAW PROFESSORS IN SUPPORT OF RESPONDENT

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I ABA Section of Antitrust Law, *Antitrust Law Developments* (4th ed. 1997) 10

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CONSENT OF PARTIES

Petitioners and respondent have consented to the filing of this brief *amici curiae*.[1]

INTEREST OF *AMICI*

This brief *amici curiae* is submitted on behalf of a group of law professors in the United States.[2] As teachers and scholars of antitrust law, the *amici* are interested in the proper interpretation and application of the federal antitrust laws. The *amici* have received no compensation or promise of compensation for submitting this brief. They submit it solely because they believe that the Second Circuit's view that a vertical agreement with an obvious effect on interbrand competition should be subject to close antitrust scrutiny is correct and that adoption of the petitioners' position that all vertical nonprice agreements require identical analyses under a "full-blown" rule of reason would impede the functioning of the federal antitrust laws.

SUMMARY OF ARGUMENT

1. Both of the lower courts interpreted the complaint in this case to allege that the petitioner NYNEX and a co-conspirator, AT&T Technologies, agreed to eliminate the respondent Discon from the market. If this Court disagrees

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[1] Their written consents have been filed with the clerk of this Court. This brief was written by the *amici curiae* listed on its cover; it was not written in whole or in part by counsel for a party. No one other than the *amici* and their institutions made any monetary contribution to the preparation or submission of this brief.

[2] The law professors are listed in an appendix to this brief.

and concludes that the complaint does not adequately allege an agreement to eliminate Discon from the market, as distinguished from an agreement simply to terminate the relationship between NYNEX and Discon, it should either remand the case to the lower courts, directing them to treat it as a simple supplier termination, or make clear that its holding would not necessarily be applicable to a case that properly alleged the elimination of a competitor.

2. This Court has said that vertical agreements are usually treated more leniently than horizontal agreements because vertical agreements, unlike horizontal ones, often promote interbrand competition. It follows that a vertical agreement that does not promote interbrand competition does not deserve lenient treatment.

An agreement between a firm and its supplier or dealer to eliminate another supplier or dealer might have any of several purposes. First, the agreement might be intended by the firm in the interbrand market to deny its competitors access to the eliminated supplier or dealer. Second, the agreement might be intended by the conspiring supplier or dealer to eliminate intrabrand competition from the eliminated supplier or dealer; in that case, the conspiring supplier or dealer might coerce the participation of the firm at the interbrand level in the agreement. Third, the agreement might be directed at some other purpose, perhaps unrelated to the usual concerns of antitrust; in the present case, that other purpose might have been regulatory fraud. Regardless of which of these purposes is intended, the agreement injures both intrabrand and interbrand competition, and therefore should be treated harshly under the antitrust laws.

3. This Court has on at least two occasions held defendants subject to § 1 liability on *per se* theories in cases where those defendants entered into no agreements with other firms at their level. In *Klor's, Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207 (1959), the *per se* liability was justified because the apparent purpose of the vertical agreements at issue was to eliminate a competitor. In *United States v. General Motors Corp.*, 384 U.S. 127 (1966), which involved only the termination of relationships with competitors, not their elimination from the market, the *per se* liability was justified by the coercion that apparently prompted the termination. Both of these cases support the view that some vertical agreements—specifically, those that do not benefit interbrand competition—are treated harshly under the antitrust laws.

4. It is not difficult to distinguish between agreements to eliminate competitors from the market and agreements simply to terminate suppliers or dealers. The essential difference is that an agreement to eliminate a competitor from the market goes beyond the relationships between the targeted competitor and the conspiring firms to make it more difficult for the targeted competitor to do business with other market participants. The adoption by this Court of harsh treatment for agreements that meet this or a similar test would provide the lower courts with useful guidance in assessing vertical agreements.

ARGUMENT

I. IF THE COMPLAINT DOES NOT ADEQUATELY ALLEGE AN AGREEMENT TO ELIMINATE DISCON FROM THE ENTIRE REMOVAL-SERVICES MARKET, THIS COURT SHOULD DIRECT THAT THE CASE BE TREATED AS A SIMPLE SUPPLIER TERMINATION.

The complaint in this case alleges that NYNEX, though its subsidiary MECo, and AT&T Technologies "took concerted action to drive Discon from the market." Amended Complaint ¶ 2, J.A. 76; *see also* Amended Complaint ¶ 33, J.A. 84. That is, the complaint alleges that the conspirators' goal was to eliminate Discon entirely as a seller of removal services, not just to terminate its status as a supplier to NYNEX. Both of the lower courts adopted this interpretation of the complaint. *See* App. to Pet. for Cert. 24a (district court), 4a (court of appeals); *but see* App. to Pet. for Cert. 28a (district court).

Whether the complaint alleges facts sufficient to support its allegation of an agreement to eliminate Discon from the market is unclear. Most of the specific factual allegations are as consistent with a simple termination by NYNEX of its relationship with Discon as they are with an attempt to eliminate Discon from the market entirely.[3] *See, e.g.,*

[3] There are two possible exceptions. First, Discon alleges that NYNEX made false statements to state and federal regulators. See Amended Complaint ¶¶ 33(a), 50, J.A. 85, 90. However, these statements appear to have been made in an attempt by NYNEX to defend its decisions not to contract with Discon, not in an independent effort to harm Discon. See Amended Complaint ¶¶ 33(a), 47, 55, 110, J.A. 85, 89, 91, 112.

(continued...)

Amended Complaint ¶ 33, J.A. 84-86. Although the complaint does allege that Discon was driven out of business, Amended Complaint ¶ 58, J.A. 92, that may have been merely the consequence of a termination of its relationship with NYNEX, not the purpose of an agreement between NYNEX and AT&T Tecnnologies. The termination of a supplier by a monopolist like NYNEX may often have the effect of causing the supplier to go out of business, but this causal relationship alone does not transform an agreement to terminate a supplier into an agreement to eliminate it from the market.

If this Court decides that Discon does not sufficiently allege that NYNEX and AT&T Technologies sought to eliminate it from the market, the Court should return the case to the lower courts, directing them to treat it as alleging a simple supplier termination. This would be appropriate in that the competitive concerns of the Second Circuit below appear to have been focused on the elimination issue. *See* App. to Pet. for Cert. 15a ("Discon alleges that MECo sought the dominance of AT&T Technologies in order to ensure the suppression of other suppliers . . . ."). Alternatively, if the Court chooses either to direct the lower courts to evaluate the case under the rule of reason or to dismiss the case, it should

[3] (...continued)

Second, Discon alleges that a NYNEX employee forced it to commit fraudulent acts that harmed a third-party scrap buyer. Amended Complaint ¶¶ 74-75, 89, J.A. 103, 108. These acts would presumably have harmed Discon's relationship with the scrap buyer and thus its position in the market. But Discon does not allege that NYNEX forced it to commit these acts as part of an agreement with AT&T Technologies; so far as the complaint alleges, the scheme was a unilateral one on the part of NYNEX or the NYNEX employee.

make clear that its decision might have been different had Discon properly alleged an agreement to eliminate a competitor. Consistent with this Court's decisions in related areas of antitrust law, *see Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752, 760-64 (1984), the Court could require that a plaintiff bringing allegations like Discon's present evidence of conduct that is inconsistent with a decision simply to terminate a business relationship. *See infra* part IV.

II. AN AGREEMENT TO ELIMINATE A COMPETITOR FROM AN ENTIRE MARKET HAS NO PROCOMPETITIVE BENEFITS AND THEREFORE SHOULD BE JUDGED MORE HARSHLY THAN AN AGREEMENT TO TERMINATE A BUSINESS RELATIONSHIP, WHETHER THE AGREEMENT IS CHARACTERIZED AS HORIZONTAL OR VERTICAL.

A complaint that adequately alleges an agreement to eliminate a competitor from an entire market alleges conduct that this Court has repeatedly condemned. *See Lorain Journal Co. v. United States*, 342 U.S. 143 (1951) (Sherman Act § 2 case, but with Sherman Act § 1 claims); *Klor's Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207, 213 (1959); *Fashion Originators' Guild of America, Inc. v. F.T.C.*, 312 U.S. 457, 461, 467 (1941). *Cf. United States v. General Motors Corp.*, 384 U.S. 127, 146 (1966) ("Exclusion of traders from the market by means of combination or conspiracy is so inconsistent with the free-market principles embodied in the Sherman Act that it is not to be saved by reference to the need for preserving the collaborators' profit margins or their system for distributing [their products] . . . .").

A. Section 1 of the Sherman Act Does Not Distinguish Between Horizontal and Vertical Agreements, so Differences in Treatment of the Two Kinds of Agreements Should Be Based on Substantive Effects, Not Formal Categorizations.

Section 1 of the Sherman Act refers to contracts, combinations, and conspiracies in restraint of trade, not to horizontal and vertical agreements. This Court has treated vertical agreements more leniently not because they are formally vertical, but because many vertical agreements have more procompetitive potential than do horizontal agreements. In *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36 (1977), where the Court established the rule that most nonprice vertical restraints would be judged under the rule of reason, it did so because vertical restraints have the "potential" to promote interbrand competition, *id.* at 51, and the Court said that "[t]hese 'redeeming virtues' are implicit in every decision sustaining vertical restrictions under the rule of reason," *id.* at 54.

It follows that where such "redeeming virtues" are absent, even vertical agreements should not be treated with deference.[4] For that reason, *Sylvania* did "not foreclose the possibility that particular applications of vertical restrictions might justify *per se* prohibition." *Id.* at 58. This emphasis on substance was not altered in *Business Electronics Corp. v. Sharp Electronics Corp.*, 485 U.S. 717 (1988). Although the

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[4] Conversely, even horizontal agreements that literally involve the fixing of prices are judged leniently if they have the potential to improve the price and/or quality of goods and services to consumers. *Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.*, 441 U.S. 1 (1979).

Court in *Business Electronics* rejected the characterization of a formally vertical agreement as horizontal, *id.* at 730 n.4, it did not say that all vertical relationships must be treated the same. Indeed, the case re-affirmed the *per se* rule against minimum resale price maintenance, holding only that for that rule to be applicable, there must be "some agreement on price or price levels." *Id.* at 736. Thus, the Court's concern was not with the application of strict rules in the vertical context, but with the clear delineation of the scope of such rules, so that they do not extend beyond their proper bounds. *Id.* at 726-28.

The view that certain vertical agreements—those that offer no procompetitive benefits—should be treated harshly is also supported by the late Professor Areeda. *See* VIII PHILLIP E. AREEDA, ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION ¶ 1625d (1989) [hereinafter AREEDA, ANTITRUST LAW]; *see also id.* ¶ 1604e2. In discussing *Business Electronics* and *Cernuto v. United Cabinet Corp.*, 595 F.2d 164 (3d Cir. 1979), an opinion on which the Second Circuit relied in the present case, Professor Areeda advocated a *per se* rule where the challenged agreement is a product of coercion. *See* AREEDA, ANTITRUST LAW ¶ 1625d, at 309 (advocating condemnation of restraint "without requiring proof of market power or effects" when "the sole—or, at least, overwhelming—motivation for the restraint is the manufacturer's surrender to a complaining dealer"). The rationale for harsh treatment in such a case, even when it involves only a dealer termination, is that when the manufacturer's participation in the agreement is coerced, there is no reason to think the agreement serves interbrand competition. *See id.* When the agreement goes beyond termination to

elimination from an entire market, the case for condemnation is even more clear.

B. An Agreement Between a Firm and Its Supplier or Dealer to Eliminate a Competing Supplier or Dealer from the Market Injures Both Intrabrand Competition and Interbrand Competition.

1. *A Firm that Goes Beyond Terminating Its Relationship with a Supplier or Dealer and Seeks to Eliminate the Supplier or Dealer from the Entire Market Injures Both Intrabrand Competition and Interbrand Competition.*

A firm might reasonably choose to terminate a relationship with its supplier or dealer. Such a termination can be procompetitive because the supplier or dealer might no longer fit into the firm's manufacturing or marketing strategy, so that to continue the relationship might hinder the firm's efforts to compete. In these circumstances, the termination is vertical, in the sense in which it matters to be vertical in antitrust, because it can "promote interbrand competition by allowing the manufacturer to achieve certain efficiencies in the distribution of his products." *Sylvania*, 433 U.S. at 54.

But when a firm goes beyond terminating its relationship with a supplier or dealer, and seeks to eliminate that supplier or dealer from the entire market, it is no longer seeking to achieve efficiencies in the distribution of its product. Once the firm's relationship with the supplier or dealer is terminated, the firm can have no legitimate interest in the supplier's or

dealer's continued presence in the market.[5] Therefore, any attempt by a firm to eliminate its former supplier or dealer from the entire market is likely to be intended not to advance procompetitive interests of its own, but to deny its competitors access to the eliminated supplier or dealer.[6] Elimination for that reason is anticompetitive, in that it would not only injure intrabrand competition (between suppliers or dealers) but also interbrand competition (between firms that use those suppliers or dealers).

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[5] Actually, one can imagine a circumstance in which a firm might have a procompetitive reason to eliminate a dealer—though not a supplier like Discon. Specifically, a firm might want to eliminate a terminated dealer from the market so that the dealer does not serve as an avenue for the evasion of vertical nonprice restraints that the manufacturer imposes on its remaining dealers. *Cf. United States v. General Motors Corp.*, 384 U.S. 127 (1966). But because these circumstances "are not sufficiently common or important to justify the time and expense necessary to identify them," *Sylvania*, 433 U.S. at 50 n.16, it seems that even for them *per se* condemnation might be appropriate. In any event, a more procompetitive approach than eliminating the terminated dealer from the market would be to enforce the vertical restraints more strictly, leaving the dealer to sell the goods of competing suppliers; for that reason, elimination of the dealer would likely not survive the rule of reason. *See* I ABA SECTION OF ANTITRUST LAW, ANTITRUST LAW DEVELOPMENTS 69 (4th ed. 1997) ("If the procompetitive effects can readily be achieved by alternative means that create substantially smaller anticompetitive effects, the justification will be rejected.") (footnote omitted).

[6] Of course, the firm also denies itself access to the eliminated supplier or dealer. But the firm could still benefit from the elimination if, for example, it had an established relationship with the remaining supplier or dealer, as NYNEX did with AT&T Technologies here, or if it were better able than its competitors to provide its own supply or distribution needs, *see* Amended Complaint ¶ 27, J.A. 83 (noting that telephone companies sometimes perform their own removal services).

In this case, however, it seems unlikely that NYNEX, which faced little competition in the local telephone services market, Amended Complaint ¶ 23, J.A. 81, would have sought to eliminate Discon so as to gain an advantage over its limited competition, and the complaint makes no such allegation. Therefore, it seems unlikely that the purpose of the agreement alleged here was to injure interbrand competitors of NYNEX. That is especially so in that, because it was a monopolist, NYNEX could probably have eliminated Discon through unilateral conduct if such a result had been in NYNEX's economic self-interest.

2. *A Firm that Acquiesces in an Agreement with a Supplier or Dealer to Eliminate Another Supplier or Dealer from the Entire Market Injures Both Intrabrand Competition and Interbrand Competition.*

AT&T Technologies, however, had an obvious interest in eliminating competition from Discon. A terminated supplier's or dealer's competitors will always have an interest in seeing the terminated supplier or dealer eliminated from the market, because it is always possible that a firm that terminates its relationship with a supplier or dealer will, as a result either of a change in the firm's distribution plan or of a change in the terminated supplier's or dealer's willingness to conform to that plan, reinstate the terminated supplier or dealer. From the point of view of the supplier's or dealer's competitors, the only way to prevent this sort of reinstatement is to ensure that the terminated supplier or dealer no longer exists.

It was therefore in the interest of AT&T Technologies to seek NYNEX's assistance in eliminating Discon from the

market. For the reasons discussed above, it is unlikely that in this case NYNEX would have believed such elimination to be in its interest, and it might not even have been indifferent to it. Nevertheless, NYNEX might have gone along with such a plan if forced to do so by AT&T Technologies. Coercion is exactly the circumstance in which Professor Areeda says that close antitrust scrutiny is justified. *See* AREEDA, ANTITRUST LAW ¶ 1625d (discussed above). If NYNEX was coerced, the alleged agreement to eliminate Discon was intended to serve only AT&T Technologies's intrabrand interests, not NYNEX's interbrand ones. *Cf. Business Electronics*, 485 U.S. at 727 n.2 (recognizing that a firm might be coerced by a dealer—or, analogously, a supplier—to enter into an anticompetitive agreement, but that such coercion must be proved).

The absence of interbrand benefit is critical because, as *Sylvania* said, the promotion of interbrand competition is "implicit in every decision sustaining vertical restrictions under the rule of reason." 433 U.S. at 54. On remand of *Sylvania*, the plaintiff, Continental T.V., Inc., in fact argued that interbrand competition was harmed by the location restriction at issue in that case because "it was unable to enter the Sacramento market." 694 F.2d 1132, 1138 (9th Cir. 1982). That is, the plaintiff argued that Sylvania's restraint eliminated it entirely from the Sacramento market. The Ninth Circuit rightly rejected that argument, observing that the location clause "did not prohibit Continental from selling another manufacturer's television sets in Sacramento." *Id.* Suppose counterfactually, however, that after Continental attempted to enter the Sacramento market, it had been

required by Sylvania not only to conform to the terms of its location restriction but also to sell Sylvania products exclusively, and that this new exclusivity requirement for Continental had been motivated entirely by coercion of Sylvania by a powerful Sacramento retailer that sought to avoid competition with Continental.[7] In that hypothetical case, the agreement between Sylvania and the coercive Sacramento retailer would have been an agreement to eliminate Continental from the entire Sacramento market, and the agreement would have injured both intrabrand and interbrand competition. In those circumstances, the antitrust analysis of Sylvania's conduct would likely have reached a different result.

3. *An Agreement Between a Firm and Its Supplier or Dealer to Eliminate Another Supplier or Dealer from the Entire Market, Even If Not Directed at Competition in the Usual Antitrust Sense, Can Injure Both Intrabrand Competition and Interbrand Competition.*

The original complaint in this case alleged that the attempt to eliminate Discon was intended to facilitate regulatory fraud. Complaint ¶ 55, J.A. 16. *See also* Amended Complaint ¶¶ 33(b), 59, 61, J.A. 85, 92, 93 (describing fraudulent scheme under which NYNEX would use higher-cost supplier AT&T Technologies, passing on costs to NYNEX customers, and would receive year-end rebate from AT&T Technolo-

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[7] One must also suppose that the retail television market was characterized by significant product differentiation, so that vigorous interbrand competition would not have checked any effort to exploit reduced intrabrand rivalry. In the present case, of course, NYNEX was not faced with significant interbrand competition.

gies). Although the amended complaint contains no reference to the agreement's facilitation of the fraud, as the district court noted, App. to Pet. for Cert. 31a, Professors Areeda and Hovenkamp nevertheless say that this case is one of fraud, not antitrust. PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION ¶ 1644'c (1997 Supp.). They treat the case as one of fraud because they say the conduct involved presented no danger of monopoly. *Id.*

That is a reasonable interpretation of the case if one takes the view, as Areeda and Hovenkamp do, that the elimination of Discon was the "consequence" of the fraud, *id.*; however, Discon alleges an agreement to eliminate it from the market, not an agreement directed at some other purpose that as a consequence eliminated it from the market. If Discon has made this allegation satisfactorily, *see supra* part I, the case is not one of fraud.[8] If Discon has *not* made this allegation satisfactorily, it may be that Areeda and Hovenkamp's interpretation of the case is correct. Or it may be, as the government has argued, *see* Brief for the United States and the Federal Trade Commission on Petition for Certiorari at 7-9, that an agreement to facilitate regulatory fraud is an antitrust violation. We take no position on this question; we note only that if parties agree to eliminate a competitor in order to

[8] In that case, the regulatory fraud might have been the means by which NYNEX was induced to enter the alleged anticompetitive agreement, not the end sought by that agreement. That is, it might have been the willingness of AT&T Technologies to engage in the regulatory fraud that gave it the power to force NYNEX to go along with the elimination of Discon alleged in the complaint. *See* Brief for the United States and the Federal Trade Commission on Petition for Certiorari at 10 & n.9 (suggesting similar explanation for acquiescence of NYNEX).

facilitate fraud, and if they in fact succeed in eliminating the competitor, the necessary effect of their agreement will be to eliminate competition. *See* Brief for the United States and the Federal Trade Commission on Petition for Certiorari at 9-11.

III. THIS COURT HAS APPLIED *PER SE* TREATMENT TO CASES INVOLVING AGREEMENTS TO ELIMINATE COMPETITORS AND COERCED AGREEMENTS TO TERMINATE COMPETITORS, WITHOUT RELYING ON THE PRESENCE OF HORIZONTAL AGREEMENTS.

This Court has on at least two occasions held defendants subject to § 1 liability on *per se* theories in cases in which those defendants entered into no agreements with other firms at their levels. *See Klor's, Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207 (1959); *United States v. General Motors Corp.*, 384 U.S. 127 (1966). Although each of these cases also involved a horizontal agreement at another level from the primary defendant, the Court did not indicate in either case that the horizontal agreement was necessary to its decision. *See Klor's*, 359 U.S. at 213 (describing the case as alleging "a wide combination consisting of manufacturers, distributors and a retailer"); *General Motors*, 384 U.S. at 145 ("Elimination, by joint collaborative action, of discounters from access to the market is a *per se* violation of the [Sherman] Act.").

Moreover, an explanation for the *per se* treatment in *Klor's* is that the primary defendant in that case, Broadway-Hale, despite being party only to vertical agreements, sought to eliminate a competitor. *See* ROBERT H. BORK, THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF 332 (1978) ("If [*Klor's*] is to find justification in antitrust terms, it must be because the boycott contained, so far as we can tell, no

possibility of efficiency and did deprive consumers of an outlet they had shown they wanted.").[9] Broadway-Hale, an appliance dealer, agreed with appliance manufacturers that the manufacturers would cease selling appliances to Klor's, a competing dealer. This Court said that Broadway-Hale "used its 'monopolistic' buying power to bring about this situation," 359 U.S. at 209, and indicated that it was the elimination of Klor's that was the goal of the vertical agreements, *see id.* at 213 (rejecting the defense that Klor's was "so small that his destruction makes little difference to the economy" and stating that "[m]onopoly can as surely thrive by the elimination of such small businessmen, one at a time, as it can by driving them out in large groups"). In that respect, *Klor's* was like *Lorain Journal Co. v. United States*, 342 U.S. 143 (1951), in

[9] *General Motors* is better viewed as a case only of termination, though termination that was the result of coercion. In *General Motors*, a group of General Motors dealers sought to eliminate "discount houses" from the market for selling General Motors cars. To accomplish this goal, the dealers joined together and sought action from General Motors itself. Although it is somewhat unclear whether General Motors itself preferred the elimination of the discount houses, *see* 384 U.S. at 137 (describing General Motors as "collaborat[ing] with these policing activities"), it seems that it would have had no independent incentive to eliminate them. Moreover, the Court suggested that the dealers acted collectively to enlist General Motors's collaboration. *See id.* at 143 ("Neither individual dealers nor the associations acted independently or separately."). Consequently, General Motors appears to have been held liable on a *per se* theory despite the fact that it was not a willing party to the horizontal agreement, but a coerced party to a vertical one. *See* AREEDA, ANTITRUST LAW ¶ 1604g3, at 70 n.133 (observing that *General Motors* is "noteworthy in imposing liability on the assumedly coerced and thus already-victimized manufacturer"). In that case, the horizontal agreement among the dealers provides the evidence of coercion that Professor Areeda says justifies *per se* treatment. *See* AREEDA, ANTITRUST LAW ¶ 1625d (discussed above).

which a firm also entered into vertical agreements in an attempt to eliminate a competitor. In both cases, the Court had no trouble finding the defendants liable.

To be sure, the Court in *Klor's* also said that the manufacturers conspired "among themselves." 359 U.S. at 209. But the agreement among the manufacturers was not treated by the Court as the source of the anticompetitive effects in the case; indeed, that would have been inconsistent with the Court's reference to Broadway-Hale's "monopolistic buying power." In fact, it appears that the agreement among the manufacturers was not an independent effort at collusion, but was subsidiary to Broadway-Hale's exercise of its power. It may be, for example, that Broadway-Hale's orchestration of an agreement among the manufacturers made them more willing to comply with Broadway-Hale's demands (because they would not thereby lose an outlet that their competitors would continue to have). And Broadway-Hale's enlistment of multiple manufacturers in its plan is evidence that the plan was not intended to advance interbrand competition among the manufacturers, but to eliminate Klor's.

IV. AN ANTITRUST RULE THAT APPLIED HARSHER TREATMENT TO AGREEMENTS TO ELIMINATE COMPETITORS THAN IS APPLIED TO AGREEMENTS TO TERMINATE BUSINESS RELATIONSHIPS WOULD BENEFIT ANTITRUST ANALYSIS.

Because an agreement to eliminate a competitor injures intrabrand competition without benefitting interbrand competition, it should be judged more harshly than a simple supplier or dealer termination. Either of two legal rules might be appropriate. One would be a *per se* rule, which Professor

Areeda has said is appropriate in cases where the challenged agreement is the product of coercion. Although "the scope of *per se* illegality should be narrow in the context of vertical restraints," *Business Electronics*, 485 U.S. at 724, it is not inconsistent with that principle to apply a *per se* rule to certain carefully delineated vertical restraints. So long as the range of applicability of the *per se* rule is clearly and carefully defined, there is little danger that it will be mistakenly applied beyond its proper bounds.

Alternatively, the Court could mandate a more strict application of the rule of reason to vertical agreements to eliminate competitors. For example, given the absence of benefit to interbrand competition from such agreements, the Court might state that such agreements are presumptively illegal. That is, proof of an agreement to eliminate a competitor could be sufficient to establish a violation of Sherman Act § 1, under the rule of reason, unless the defendant could show that the agreement had procompetitive benefits.

The court of appeals below advocated a similar approach, saying that although "*per se*" treatment might be appropriate, App. to Pet. for Cert. 13a n.6, NYNEX would be permitted on remand to offer procompetitive justifications for its actions. *Id.* at 12a-13a; *see also* Brief for the United States and the Federal Trade Commission on Petition for Certiorari at 16-17 (supporting court of appeals's approach). This approach would be consistent with the "quick look" rule of reason adopted for horizontal restraints among joint venturers in *N.C.A.A. v. Board of Regents*, 468 U.S. 85 (1984).

If either of these rules is to be applied to agreements to eliminate competitors, it is critical that such agreements be distinguishable from agreements to terminate business

relationships, which would continue to be assessed under the rule of reason, with the burden on the plaintiff to prove anticompetitive effects. The essential difference is that an agreement between a firm and its supplier or dealer to eliminate another supplier or dealer goes beyond the relationship between the firm and the favored supplier or dealer to make it more difficult for the supplier or dealer whose elimination is sought to deal with other market participants. For example, an agreement to eliminate a competitor might involve efforts to injure directly the relationships of the disfavored supplier or dealer with other market participants. *Cf. supra* note 2.[10] Or it might involve enforcement of a contract between one of the conspiring firms and the disfavored supplier or dealer that provides no benefit to the conspiring firm but disadvantages the supplier or dealer. *Cf. Serfecz v. Jewel Food Stores*, 67 F.3d 591, 594 (7th Cir. 1995) (allegation by shopping mall, Grove Mall, that food

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[10] It is important to emphasize that these acts must be in furtherance of an agreement to eliminate the competitor from the entire market. There are many cases in which references are made to defendants' attempts to "eliminate" competitors from the market, but where the facts go no further than to show attempts to take away the competitors' customers. For example, in one leading case, *Northwest Power Products, Inc. v. Omark Industries, Inc.*, 576 F.2d 83 (5th Cir. 1978), *cert. denied*, 439 U.S. 1116 (1979), the court refers at one point to the efforts of the defendants, a manufacturer and its new distributor, "[t]o eliminate [a terminated distributor] from the market," *id.* at 86, but the facts appear to reflect only efforts, albeit unethical ones, by the defendants to shift the terminated distributor's customers to the new distributor. *See id.* at 85 (characterizing plaintiff as alleging that defendants conspired "to deprive it of its customers by tortious and unfair means"), 91 (noting that though the plaintiff's market share had decreased, it continued to compete with the new distributor).

store and new mall to which food store had moved "conspired to run Grove Mall out of business" by maintaining lease on now-empty anchor location in Grove Mall), *cert. denied*, 516 U.S. 1159 (1996); *supra* pages 12-13 (discussing hypothetical involving location and exclusivity restraints instituted to prevent dealer's entry into new market).

The task of distinguishing agreements to eliminate competitors from agreements to terminate distributors is one that the lower courts are well qualified to perform. Indeed, the rationale for the usual application of a rule of reason lies in the assumption that courts can distinguish factual circumstances that present anticompetitive dangers from those that do not. Application of a more strict rule in certain circumstances does not make this task of characterization more difficult; instead, it makes the task easier, by setting out specific criteria for its performance.

* * *

The rule of reason applicable to most antitrust challenges to business practices places a difficult burden on the plaintiff to establish, on a full record, the anticompetitive effect of the defendant's business practices. In light of the costs of litigation and the treble damages provided for in the Clayton Act, such a burden is justified for the majority of business practices that carry the potential to be procompetitive or at least competitively neutral. Since the early part of this century, however, this Court has recognized that this burden need not be borne by plaintiffs in those cases where the likelihood of competitive harm is sufficiently high to permit the courts to infer such harm from the nature of the business practice challenged. *See United States v. American Tobacco Co.*, 221 U.S. 106, 179 (1911) (rule of reason infers unreasonableness

of certain agreements because of their "inherent nature or effect" or "evident purpose"). Where a firm conspires with others to eliminate a rival from the entire market, the "evident purpose" of the restraint is sufficiently anticompetitive to permit the case to go forward, at least to the point of requiring the defendant to explain its actions, without initially requiring the plaintiff to present the detailed economic and factual record required by *Board of Trade of Chicago v. United States*, 246 U.S. 231 (1918).

CONCLUSION

The decision of the court of appeals should be affirmed.

Respectfully submitted,

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APPENDIX

APPENDIX
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